89-1806

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES ARMY, ET AL., PETITIONERS

v.

SERGEANT PERRY J. WATKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal government may ever be estopped from applying one of its valid regulations.

2. Whether the United States Army may be estopped from applying a valid regulation regarding the minimum qualifications of service members.

3. Whether the Army in this case was guilty of the type of affirmative misconduct that may give rise to estoppel.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants below, are the United States Army, Major General E.R. Thompson, Major General Robert Elton, Office of the Adjutant General, Fort Lewis Washington, Sylvia Wilkens, Lieutenant Colonel Richard D. Riley, United States Army Central Personnel Security Clearance Facility, and Colonel Richard J. Backus. The respondent, plaintiff below, is Perry J. Watkins.

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The Solicitor General, on behalf of the Department of the Army and the other Army offices and officials named as defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals en banc (*Watkins III*) (App., *infra*, 1a-89a) is reported at 875 F.2d 699. The opinion of the panel (*Watkins II*) (App., *infra*, 90a-164a), which was withdrawn by *Watkins III*, is reported at 847 F.2d 1329. A prior panel opinion of the court of appeals (*Watkins I*) (App., *infra*, 165a-173a), which was overruled by *Watkins III*, is reported at 721 F.2d 687. The most recent opinion of the district court (App., *infra*, 174a-178a), which was reversed in both *Watkins II* and *Watkins III*, is unreported. The first opinion of the district court (App.,

infra, 197a-215a) is reported at 541 F. Supp. 249, and the second opinion of the district court (App., *infra*, 179a-196a), is reported at 551 F. Supp. 212.

JURISDICTION

The judgment of the limited en banc panel of the court of appeals was entered on May 3, 1989.[1] On January 19, 1990, the court of appeals denied the Government's petition for rehearing. App., *infra*, 216a. On April 10, 1990, Justice O'Connor extended the government's time for filing a petition for certiorari to and including May 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATORY PROVISIONS INVOLVED

Paragraph 2-24 of Army Regulation 601-280 (1981) states:

> **Nonwaivable disqualifications.** Applicants to whom the following disqualification(s) apply are ineligible for Regular Army reenlistment at any time and requests for waiver or exception to policy will not be submitted.* * *
>
> * * * * *
>
> c. Persons of questionable moral character, a history of antisocial behavior, sexual perversion, and/or homosexuality (includes an individual who has committed homosexual acts or is an admitted homosexual but as to whom there is no evidence that

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[1] A limited en banc panel consists of the Chief Judge and ten other judges drawn by lot from the active judges of the court. See 9th Cir. R. 35-3. Rule 35-3 also provides for "rehearing by the *full* court following a hearing or rehearing en banc." *Ibid.* (emphasis added).

they have engaged in homosexual acts either before or during military service (see *Note*).

**Note.* Homosexual acts consists of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication, and in the absence of other evidence that the individual is a homosexual, normally will not be excluded from reenlistment. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.

Paragraph 15-2.a of Army Regulation 635-200 (1981) states:

a. **Homosexuality is incompatible with military service.** The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must

live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.

Paragraph 15-4 of Army Regulation 635-200 (1981) provides that a service member "shall" be separated if one or more of the following findings is made:

a. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(1) Such conduct is a departure from the member's usual and customary behavior;

(2) Such conduct under all circumstances is unlikely to recur because it is shown, for example, that the act occurred solely as a result of immaturity, intoxication, coercion, or a desire to avoid military service;

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(4) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(5) The member does not desire to engage in or intend to engage in homosexual acts.

b. The member has stated that he/she is a homosexual * * * unless there is a further finding that the member is not a homosexual * * *.

c. The member has married or attempted to marry a person known to be of the same biological

sex * * * unless there are further findings that the member is not a homosexual * * * (e.g., where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

STATEMENT

1. In August 1967, the United States Army drafted respondent. On his pre-induction medical form, respondent marked "yes" in response to a question asking whether he currently experienced, or previously had experienced, homosexual tendencies. App., *infra*, 2a. An Army psychiatrist who evaluated respondent concluded, however, that he did not have such tendencies. Because respondent was otherwise qualified for admission, the Army inducted him into the service. *Id.* at 179a-180a.

In November 1968, the Army Criminal Investigation Division (CID) conducted an investigation to determine whether respondent had committed homosexual sodomy, a criminal offense under the Uniform Code of Military Justice, 10 U.S.C. 925. In a sworn statement dated November 19, 1968, respondent declared that he had committed numerous acts of homosexual sodomy both before and during his military service, and that those acts included incidents in military barracks with other servicemen. App. *infra*, 3a, 180a. Because of the lack of corroborating evidence, however, the CID terminated the criminal investigation. *Id.* at 180a.

In 1970, at the conclusion of his first enlistment contract, respondent received an honorable discharge. His eligibility for reenlistment was designated as "unknown." Pursuant to respondent's request, however, the Army redesignated him as eligible for reenlistment, and, respondent reenlisted for a three-year term. App., *infra*, 3a. The following year, in January 1972, the Army denied re-

spondent a security clearance because of his 1968 admission of homosexuality. *Ibid.* In March 1972, the CID again investigated respondent for alleged homosexual activities, but the criminal investigation was terminated because of insufficient evidence. *Id.* at 167a.

In 1974, respondent reenlisted for a six-year term. Shortly thereafter, respondent's commander discovered that respondent had a history of homosexual tendencies. In 1975, the commander convened an administrative board to determine if respondent was unsuitable for duty because of his homosexuality. App., *infra*, 3a. The board concluded that respondent was homosexual, but it determined that he should be retained and be deemed suitable for duty in administrative positions. *Id.* at 3a-4a.[2]

In 1977, the commander of the Fifth United States Army Artillery Group granted respondent a security clearance for information classified as "secret." App., *infra*, 4a. Respondent then applied for a position in the Nuclear Surety Personnel Reliability Program, which requires applicants to have a security clearance and to pass a background investigation. Because the background check revealed respondent's homosexuality, the Army rejected his application. Respondent filed an administrative appeal, however, and the Army reversed its decision and accepted him into the program in 1978. *Ibid.*

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[2] The pre-1981 regulations that established separation criteria for homosexual service members were unclear. Their imprecision created confusion within the military as to whether administrative boards had discretion to retain a soldier who had committed homosexual acts. See *Beller* v. *Middendorf*, 632 F.2d 788, 805 n.14 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Accordingly, in 1981, pursuant to a Department of Defense Directive, all the services revised and clarified the relevant regulations. See note 4, *infra*.

In 1979, respondent reenlisted for a three-year term. In July 1980, the Army reconsidered its earlier decision regarding respondent's security clearance. The Army revoked respondent's clearance because, in the Army's judgment, the following factors made respondent a security risk: (1) he recently had admitted that he had been homosexual for the past 15 to 20 years; (2) his homosexuality was corroborated by the 1968 affidavit in which he admitted having committed homosexual acts; and (3) he had a history of performing (with the permission of his commanding officer) as a female impersonator in various revues. App., *infra*. 4a-5a.

In 1981, the Army adopted new regulations that unequivocally mandated the discharge of all homosexuals.[3] Thus, the Army again convened an administrative board to determine if respondent was unsuitable for duty because of his homosexuality. App., *infra*, 5a. The board, with one member dissenting, recommended that respondent be deemed unsuitable for military service due to homosexuality and that he receive an honorable discharge. *Id.* at 5a, 198a.

2. Respondent brought this action in the Western District of Washington to enjoin the Army from discharging him. App., *infra*, 183a. On April 12, 1982, the district

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[3] Unlike the separation criteria in the pre-1981 regulations, the 1981 regulations provide that homosexual service members "shall" be separated (Army Reg. 635-200 para. 15-4). The regulations apply to "persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct * * *." Army Reg. 635-200 para. 15-2.a. Specifically, the regulations cover "person[s], regardless of sex, who engage[] in, desire[] to engage in, or intend[] to engage in * * * bodily contact * * * [with] members of the same sex for the purpose of satisfying sexual desires." Army Reg. 635-200 para. 15-3.a, c.

court entered a preliminary injunction against respondent's discharge until the court ruled on the parties' motions for summary judgment. *Id.* at 198a-199a. On May 18, 1982, the court permanently enjoined the Army from discharging respondent on the basis of his admissions of homosexuality. *Id.* at 214a. The court held that such an action would violate the Army's regulation against administrative double jeopardy because it would essentially repeat the discharge proceedings of 1975. *Id.* at 207a-214a.

The Army did not appeal the district court's order because respondent's enlistment contract was scheduled to expire in October 1982. The Army concluded that the controversy would then be moot because homosexuality was a "nonwaivable disqualification" to reenlistment. Army Reg. 601-280 para. 2-24. When respondent applied for reenlistment toward the end of his enlistment period, the Army denied his application "[b]ecause of self admitted homosexuality as well as homosexual acts." App., *infra*, 6a.

Respondent returned to the district court in an effort to compel the Army to retain him. On October 5, 1982, the district court granted summary judgment to respondent. The court held that the Army was equitably estopped from refusing to reenlist respondent on the basis of his admitted homosexuality. App., *infra*, 179a-196a. The Army appealed.

3. In *Watkins I*, a unanimous panel of the Ninth Circuit reversed and held that equitable estoppel claims by service members against the military are not justiciable. App., *infra*, 165a-173a. The court observed that the use of equitable powers "to compel superior officers to disobey regulations at the instance of a subordinate is a serious threat to military discipline." *Id.* at 170a. Accordingly, the court held, "absent a determination that the regulations cannot be given legal effect," the district court has no

power to force respondent's superiors to disobey them. *Id.* at 171a. The court therefore remanded the case to the district court to determine whether the Army's regulations regarding homosexuals were constitutionally valid. *Ibid.*

On remand, the district court held that the regulations were constitutional. App., *infra*, 174a-178a. The court therefore entered summary judgment for the Army. Respondent appealed.

4. In *Watkins II*, a divided panel reversed. Judge Norris, joined by Judge Canby, held that the challenged regulations were "constitutionally void on their face." App., *infra*, 141a. The majority found that the regulations "violate the constitutional guarantee of equal protection of the laws because they discriminate against persons of homosexual orientation, a suspect class, and because the regulations are not necessary to promote a legitimate compelling governmental interest." *Id.* at 141a. The majority therefore ordered the Army to consider respondent's reenlistment application without regard to respondent's homosexuality. *Ibid.* Judge Reinhardt dissented. *Id.* at 142a-163a.

The government petitioned for rehearing, and the court granted the suggestion for rehearing en banc. App., *infra*, 164a.

5. In *Watkins III*, a divided limited en banc court (see note 1, *supra*) overruled *Watkins I* and held that the Army is estopped from applying its regulations to respondent. App., *infra*, 1a-24a.[4] The majority first concluded that, contrary to *Watkins I*, equitable estoppel claims by service members against the military are justiciable because the "stringent requirements that must be satisfied before the

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[4] In light of its estoppel holding, the *Watkins III* court withdrew the *Watkins II* opinion and declined to address the equal protection issue. App., *infra*, 9a.

government will be estopped safeguard the military from unjustified interference by the courts." *Id.* at 13a.[5]

The court then examined the merits of respondent's estoppel claim. First, the court found that the Army had engaged in affirmative misconduct. The court stated:

> [T]he Army's conduct went far beyond a mere failure to inform or assist. * * * [T]he Army did not stand aside while [respondent] reenlisted or accepted a promotion; it plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and promoting [respondent]. Furthermore, this case does not merely involve misinformation provided by government agents. Rather, it involves ongoing active misrepresentations by Army officials acting well within their scope of authority. "Without Army approval [respondent] would not have been able to enter, remain or progress in the Army. [Petitioners] point out that reenlistment is exclusively the Secretary's function. Here he exercised his authority three times. . . . To satisfy the element of affirmative misconduct the court need look no further."

App., *infra*, 16a-17a (citations omitted). Second, the court found that the injustice that respondent would suffer if estoppel were denied outweighed the damage to the public interest if estoppel were imposed. The court noted that respondent "has greatly benefitted the Army, and

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[5] Judge Norris, who had concurred in *Watkins I*, did not join the majority's opinion in *Watkins II* because he "agree[d] with the dissent that the judgment cannot rest on the doctrine of equitable estoppel." App., *infra*, 26a. He nevertheless concurred in the judgment, and he wrote a lengthy opinion reiterating the equal protection rationale he articulated in *Watkins II*. *Id.* at 26a-70a.

Judge Canby concurred, endorsing both the equitable estoppel rationale in *Watkins III* and the equal protection rationale in Judge Norris's concurrence. App., *infra*, 25a.

therefore the country, by his military service * * * [and] [respondent's] homosexuality clearly has not hurt the Army in any way." *Id.* at 18a. Accordingly, the court concluded that "[t]he harm to the public interest if reenlistment is not prevented is nonexistent." *Id.* at 18a-19a. By contrast, the court stated that the injury that respondent would suffer if the Army is not estopped is substantial—namely, the loss of his career. *Id.* at 18a.

The court next found that the four traditional elements of estoppel were also present. App., *infra*, 19a-23a.[6] The court found that: (1) the Army personnel responsible for respondent's enlistment and reenlistments knew he was homosexual; (2) respondent was entitled to believe that his military career would not be discontinued due to his homosexuality; (3) respondent was ignorant of the "true fact" that homosexuality is a nonwaivable disqualification for reenlistment; and (4) respondent "relied to his injury on the many 'green lights' he received from Army representatives." *Id.* at 22a-23a. The court therefore reinstated the district court's October 5, 1982 order estopping the Army from applying its regulations to deny respondent's reenlistment application. *Id.* at 23a.

Judge Hall dissented, arguing that equitable estoppel claims by service members against the military are not justiciable. App., *infra*, 71a-89a.[7] It is well established,

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[6] The court described these four elements as follows:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

App., *infra*, 19a.

[7] Judge Hall's dissent was joined, in full or part, by Chief Judge Goodwin and Judges Beezer and Trott. App., *infra*, 89a.

she declared, that a court may not review a claim by a service member against the military unless the member alleges a constitutional, statutory, or regulatory violation. *Id.* at 72a. Judge Hall wrote that "[t]hese prerequisities to judicial scrutiny of military affairs serve to advance a widely recognized goal: minimizing 'judicial inquiry into, and hence intrusion upon, military matters.' " *Id.* at 74a. Judge Hall concluded that "[i]t is clear that a court using its equitable powers to compel superior officers to disobey regulations at the instance of a subordinate is a serious threat to military discipline." *Id.* at 80a.

Judge Hall's dissent also argued that respondent's estoppel claim failed on the merits. The dissent contended that the Army's benign failure to enforce its reenlistment regulations did not constitute affirmative misconduct. App., *infra*, 84a-86a. And, she noted that the public interest might be damaged by estopping the Army from enforcing its regulation. *Id.* at 87a-88. Finally, Judge Hall maintained that the traditional elements of estoppel were absent because respondent's asserted reliance on an "inferential understanding" that he could continue in the Army was unreasonable. *Id.* at 87a.

6. The Government filed a petition for rehearing with suggestion for rehearing by the full en banc court. The court denied that petition on January 19, 1990. App., *infra*, 216a.

REASONS FOR GRANTING THE PETITION

1. On February 21, 1990, this Court heard argument in *OPM* v. *Richmond*, No. 88-1943. In that case, the Solicitor General has argued, among other things, that the application of estoppel against the government (1) is contrary to the rule of sovereign immunity; (2) violates the constitutional principle of separation of powers; and (3) is not in the public interest. Accordingly, we have urged the

Court to hold that the government may never be estopped from applying valid legal rules.[8]

The Ninth Circuit in this case, contrary to our submission in *Richmond*, has held that the Army is estopped from applying its regulations regarding service by homosexuals. Because this Court's opinion in *Richmond* will likely shed light on the correctness of the Ninth Circuit's decision, this petition should be held and disposed of in light of *Richmond*.

2. Even if the government may be estopped in some circumstances, cases involving the application of valid regulations with respect to the minimum qualifications of Army service members should not be among them. This Court has consistently ruled that unauthorized acts of military personnel have not estopped the Army. See, *e.g.*, *Sutton* v. *United States*, 256 U.S. 575 (1921); *Filor* v. *United States*, 76 U.S. (9 Wall.) 45 (1870); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269 (1869). The Ninth Circuit's contrary ruling, which holds that the military can be estopped from applying lawful reenlistment and retention regulations, attests to the need for this Court to confirm the "no estoppel" rule in the context of military personnel decisions.

Estoppel claims involving the application of military personnel regulations are especially inappropriate for judicial review. Several courts of appeals have held that claims by service members against the military are not justiciable unless the claim alleges a violation of a constitutional, statutory, or regulatory right. See, *e.g.*, *Costner* v. *Oklahoma Nat'l Guard*, 833 F.2d 905 (10th Cir. 1987); *Stinson* v. *Hornsby*, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 109 S. Ct. 402 (1988); *Williams* v. *Wilson*, 762

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[8] We have supplied respondent with copies of our briefs in *Richmond*.

F.2d 357 (4th Cir. 1985); *Penagaricano* v. *Llenza*, 747 F.2d 55 (1st Cir. 1984); *Nieszner* v. *Mark*, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). "These prerequisites to judicial scrutiny of military affairs serve to advance a widely recognized goal: minimizing 'judicial inquiry into, and hence intrusion upon, military matters.' " App., *infra*, 74a (Hall, J., dissenting).

In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), this Court held that "[t]he unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel with a *Bivens*-type remedy against their superior officers." *Id.* at 304. The point of *Chappell* is that courts should not give rights to service members that are not created by Congress or the Executive. The Constitution explicitly gives those Branches, not the Judiciary, "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Id.* at 301. The Ninth Circuit's decision in this case, holding that military officials may be equitably estopped by courts from enforcing otherwise valid reenlistment regulations, conflicts with this understanding.

A decision regarding a person's suitability for military service under valid personnel regulations is not fit for judicial review and determination. Such decisions are committed to "military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986). Here, the Ninth Circuit has ordered the Secretary of the Army to disregard his judgment that respondent's presence in the Army will "seriously impair[]

the accomplishment of the military mission." Army Reg. 635-200 para. 15-2.a. The Ninth Circuit's decision should not stand.

3. In any event, even if the Army may be estopped from applying its personnel regulations in some circumstances, respondent did not prove the elements of estoppel in this case. One such element is the presence of "affirmative misconduct" by the government. See *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 58, 60-61 (1984). In this case, however, the Army did not affirmatively represent to respondent that homosexuality was not a bar to reenlistment. Instead, the Army simply failed to enforce its regulations regarding homosexuals. The court of appeals has in effect adopted a rule that says a violation of a personnel rule in the past precludes the government from enforcing that rule in the present. As Judge Hall noted:

> The Army's prior leniency and understanding in permitting [respondent] to reenlist was not a promise or active representation by the Army that its regulation prohibiting homosexuals was a nullity. At most, the Army's conduct in reenlisting [respondent] in the past created, by inference, a representation that the Army would overlook its regulation as to a particular enlistment period. Such apparent acquiescence does not meet the threshold level of misfeasance needed to trigger equitable estoppel against the military.

App., *infra*, 85a-86a (dissenting). In addition, it is not plausible to maintain that respondent, whose position in the Army was that of personnel specialist, did not know or should not have reasonably known that the Army personnel regulations posed an absolute bar to his reenlistment.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of *OPM* v. *Richmond*, No. 88-1943.

Respectfully submitted.

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MAY 1990

U.S. GOVERNMENT PRINTING OFFICE 1990 – 262 203/00897